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Coitus and Consequences in the Legal System: An Experiment Study

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COITUS AND CONSEQUENCES IN THE LEGAL SYSTEM: AN EXPERIMENTAL STUDY

Joni Hersch* and Beverly Moran†

ABSTRACT

Scholars have found that men who physically harm their intimate partners receive less punishment than men who harm strangers. In other words, in the criminal setting, coitus has consequences. In particular, for female victims, the consequence is often a legal system that offers little or no protection. Until the experimental study presented here, no one has asked whether the same is true in civil actions.

This original experimental survey, fielded on eight hundred participants, provides the first-ever evidence on whether legal decision makers hold sexual activity against females in civil settings. Participants received four scenarios—a homicide, a workplace sexual harassment, a long-term business relationship, and a short-term joint venture—with randomized information about prior sexual activity between the parties. As in the criminal setting, the results show that the taint of a sexual relationship hurts women, even in civil lawsuits. Yet, the results also show that evidence of sexual activity did not hurt the female complainant in the sexual harassment scenario and it actually increased the male killer's liability in the homicide scenario. The results also suggested that male jurors may be more influenced by evidence of a female's sexual activity than are female jurors. Based on these findings, attorneys might fear less that a "nuts and sluts" defense will derail a sexual harassment action; but attorneys might continue to fear that a female plaintiff's sexual activity could defeat her claim in a business setting.

This original experimental survey, fielded on eight hundred participants, provides the first-ever evidence on whether legal decision makers hold sexual activity against females in civil settings. Participants received four scenarios—a homicide, a workplace sexual harassment, a long-term business relationship, and a short-term joint venture—with randomized information about prior sexual activity between the parties. As in the criminal setting, the results show that the taint of a sexual relationship hurts women, even in civil lawsuits. Yet, the results also show that evidence of sexual activity did

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not hurt the female complainant in the sexual harassment scenario and it actually increased the male killer's liability in the homicide scenario. The results also suggested that male jurors may be more influenced by evidence of a female's sexual activity than are female jurors. Based on these findings, attorneys might fear less that a "nuts and sluts" defense will derail a sexual harassment action; but attorneys might continue to fear that a female plaintiff's sexual activity could defeat her claim in a business setting.

TABLE OF CONTENTS

| | |
|---|-----|
| I. INTRODUCTION | 928 |
| II. LITERATURE REVIEW | 932 |
| III. THE SURVEY | 935 |
| A. CRIMINAL LIABILITY AND SELF-DEFENSE | 936 |
| B. SEXUAL HARASSMENT | 937 |
| C. LONG-STANDING BUSINESS TRANSACTIONS | 939 |
| D. SHORT-TERM BUSINESS RELATIONSHIP | 939 |
| IV. FINDINGS | 940 |
| A. SCENARIO 1: CRIMINAL LIABILITY AND SELF-DEFENSE | 940 |
| B. SCENARIO 2: SEXUAL HARASSMENT | 942 |
| C. SCENARIO 3: LONG-STANDING BUSINESS TRANSACTIONS | 943 |
| D. SCENARIO 4: SHORT-TERM BUSINESS RELATIONSHIP .. | 944 |
| V. IMPLICATIONS AND CONCLUSIONS | 944 |
| APPENDIX: REGRESSION ANALYSIS & CONTROLS..... | 948 |

I. INTRODUCTION

IN a time of freely available contraception, legal abortion, and high rates of non-marital childbearing, does the legal system penalize women for sexual relations with a male adversary? In criminal settings, evidence shows that males who harm their intimate partners are punished less harshly than males who harm strangers.¹ In the civil context, evidence of a woman's sexual activity with the person that she complains of or with other people both in and outside the office is admissible as a defense against a claim of sexual harassment.²

In this Article, we present results from an experimental study we conducted to test whether participants are more or less likely to impose liability in two types of actions where sexual activity was shown to make a

1. Murray A. Straus, *Sexual Inequality, Cultural Norms, and Wife-Beating in VICTIMS AND SOCIETY* (Emilio C. Viano ed., Visage Press 1976) (marriage is a license to commit violence based on studies that show that men are less likely to be held to account for violence against their wives or girlfriends).

2. Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155 (1995) (study of the defeat of an attempt to bar evidence of prior sexual activity under the Federal Rules of Evidence).

difference in past studies—homicide and sexual harassment—and for two civil actions not yet studied: a long-term business relationship and a short-term joint venture.³ In each scenario, participants were randomly assigned information about whether the parties had prior sexual relations.

Previous literature suggests a “female victim penalty” with harsher sentences for crimes against females.⁴ Other studies find an intimacy bonus: males receive less punishment for killing an intimate partner than a stranger.⁵ Some of these studies argue that women who act outside traditional female roles are less protected by the justice system,⁶ while others argue that the closer the parties are, the more distant the law;⁷ and lawyers suggest that a “nuts and sluts” defense works magic against sexual harassment claims.⁸ In other words, although the literature supports a fe-

3. Myrna Faye Dawson, *Intimacy and Law: The Role of Victim-Defendant Relationship in Criminal Justice Decision-Making* (2001) [hereinafter *Intimacy*] (unpublished Ph.D. Dissertation, Department of Sociology, University of Toronto) (intimate partner bonus reduces punishment for male abusers), <http://www.collectionscanada.gc.ca/obj/s4/f2/dsk3/ftp04/NQ59075.pdf> [<http://perma.cc/CZQ3-W5ZT>]; Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time*, 38 LAW & SOC'Y REV. 105 (2004) [hereinafter *Rethinking*] (Canadian study showing that intimate relationships soften punishment at the early stages of the criminal justice process; for example, by producing fewer arrests); Monnin, *supra* note 2 (lawyers use prior sexual activity to support defenses against sexual harassment charges).

4. See Theodore R. Curry, Gang Lee & S. Fernando Rodriguez, *Does Victim Gender Increase Sentence Severity? Further Explorations of Gender Dynamics and Sentencing Outcomes*, 50 CRIME & DELINQUENCY 319 (2004) (the situation presenting a female victim and a male perpetrator results in the harshest punishment in terms of sentence length); Marian R. Williams, Stephen Demuth & Jefferson E. Holcomb, *Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision Making*, 45 CRIMINOLOGY 865 (2007) (explores reasons why killers of white women receive harsher treatment); Marian R. Williams & Jefferson E. Holcomb, *The Interactive Effects of Victim Race and Gender on Death Sentence Disparity Findings*, 8 HOMICIDE STUD. 350, 370–72 (2004) (the white female effect in sentencing is explained by other legally relevant factors); Katharine D. Evans, *The Impact of Victim-Offender Familial Relationships on Capital Sentencing Outcomes* (2005), <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=3870&context=etd> [<http://perma.cc/8XN8-6RTU>] (Graduate Thesis, University of South Florida) (offenders with female victims were more likely to receive the death penalty for family homicide than those with male victims).

5. See *Rethinking*, *supra* note 3 (differences in treatment between stranger crime and intimate crime); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 693 (2006) (assault and rape receive an intimacy benefit such that these crimes are less likely to be prosecuted at all if there is an intimate relationship).

6. Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Difference in Crime Seriousness Judgments*, 42 LAW & SOC'Y REV. 45, 48–49 (2008) (Israeli study showing that the women who are the most “female” in an approved way—wife, stay at home mother, etc.—get the benefit of chivalry); Barbara Masser, Kate Lee & Blake M. McKimmie, *Bad Woman, Bad Victim? Disentangling the Effects of Victim Stereotypicality, Gender Stereotypicality and Benevolent Sexism on Acquaintance Rape Victim Blame*, 62 SEX ROLES 494–95 (2010) (women who act outside of standard female roles receive less protection from the legal system).

7. DONALD BLACK, *THE BEHAVIOR OF LAW* 40–44 (Academic Press 1976) (the law is disinclined to interfere with private relations between people who are socially close).

8. See Monnin, *supra* note 2, at 1156.

male victim penalty for strangers,⁹ there are indications of an intimacy bonus if a male assailant knew the female victim.¹⁰

Based on the intimate partner literature in the criminal context, we suspected that the closer our male and female characters, the less liable our participants would find the male.¹¹ That idea was not supported by the experiment's results. Given the prior literature, we were surprised to find that participants did not automatically punish the female for having sex with her male adversary.¹² Nonetheless, men and women often interpreted sexual activity differently in assessing liability. Males were more likely to act in line with the intimate partner literature by reducing the male assailant's liability or punishment. Our findings are the first ever on this topic in a civil setting and have broad implications regarding evidence standards and the significance of sexual activity in determining liability.¹³

One question that our research raises is whether sexual activity should remain legally relevant in sexual harassment actions. Our sexual harassment scenario is based on actions—sexual advances by a boss—that working women in the 1950s would have recognized as a routine occurrence not worthy of mention. Some participants were told that the female complainant had previously had sex with someone at work. Other participants were told that she had previously had sex with the male she identified as the harasser. We thought that the chance of participants' finding liability was low in the sexually purest version of the story and impossible once the sexual relationship between the male and female was revealed. Indeed, the present state of Rule 412 of the Federal Rules of Evidence allows defendants in sexual harassment actions to offer evidence of the plaintiff's past sexual behavior where the probative value outweighs harm to the victim precisely because a victim's past sexual behavior is considered potentially legally relevant.¹⁴

9. See Levine, *supra* note 5.

10. *Id.*

11. See Rethinking, *supra* note 3.

12. *Id.*

13. The lack of studies on legally irrelevant factors in civil liability is not surprising given that the race, socioeconomic class, intimate relationship between, and gender of civil litigants is not generally recorded in civil actions. John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101 YALE L.J. 1875 (1992) (comparison of criminal and civil litigation). For general statistics regarding trials in State Courts, see Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, 2011 Forum for State Appellate Court Judges (2011); LYNN LANGTON & THOMAS H. COHEN, BUREAU JUSTICE STATISTICS, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. Dep't of Justice, Office of Justice Programs, (Oct. 2008), <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> [<http://perma.cc/U3QZ-8UY4>]; Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

14. FED. R. EVID. 412. (evidence of both plaintiff's and defendant's sexual behavior is relevant in sexual harassment claims).

Rule 412 was revised in 1994 in order to expand the protection afforded for victims of both civil and criminal sexual misconduct. The amendments to Rule 412 sought to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence signifi-

Our survey participants completely disagreed with our predictions. Both male and female survey participants overwhelmingly found actionable harassment in each of the three versions of the sexual harassment story. If ordinary U.S. residents, most of whom are employed (and almost all of whom have been employed) find that prior sexual activity—even activity between plaintiff and defendant—is legally irrelevant in sexual harassment actions, perhaps the Federal Rules of Evidence should follow suit.

Since feminism entered the legal academy, scholars have questioned the need for a reasonable woman standard, arguing that men and women often perceive legally relevant factors—such as danger—differently.¹⁵ Our findings suggest that men and women do disagree about whether intimate relationships lower the likelihood that one partner will harm the other.¹⁶ When we added evidence of a sexual relationship between the victim and defendant to the homicide scenario, our male participants' willingness to excuse male violence was substantially greater than our female participants' willingness to excuse the same behavior. These findings beg the question: as a society, do we want conflicts between male and female perceptions of danger and sexual activity to play out undercover in jury rooms, charging decisions, and sentencing determinations, or do we want a more explicit examination of the legal relevance of sexual activity in the context of violence?

cantly outweighs possible harm to the victim. Rule 412 was extended to civil cases in order to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping as well as to encourage victims to come forward.

Subdivision [412] (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions in recognition of the greater flexibility needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

FED. R. EVID. 412 advisory committee's note.

15. CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (NYU Press 2000) (authors look at four legal areas where men and women have different views of reasonableness: sexual harassment, stalking, domestic homicide, and rape); Stephanie M. Wildman, *Review: Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797 (2000) (review of *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN*); Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291 (2009) (asking whether male or female perceptions of investment risk rule the reasonableness standard in securities fraud).

16. Surprisingly, our experiment does not find significant differences by gender in the perception of what actions constitute sexual harassment. See discussion *infra* Table 4.

No prior studies ask if legal decision-makers take sexual behavior into account when assessing liability and damages in business relationships. Our findings indicate that it is likely that jurors, particularly male jurors, do take female sexual behavior into account when assessing liability and damages. In our experiment, both male and female participants awarded more money to the male when the male and female characters were in a long-term sexual and business relationship. In addition, our male participants awarded the male more money (in the sense of a smaller award for the female) when the characters were in both a short-term business and sexual relationship.

Given that in each business scenario the female took a traditional male approach to protecting private assets—not getting married in one scenario and creating a contractual relationship in the other—we wondered why the male participants took sexual activity into account in the male's favor in both relationships. Each of these scenarios and results speaks to the relevance of evidence of relationships, particularly sexual relationships, between plaintiffs and defendants in criminal and civil trials.

In Part II we discuss previous work showing that both gender and the sexual relationships between victims and assailants affect outcomes in criminal litigation. We also discuss how these results, though not previously analyzed, might present in civil litigation. Following this discussion, we provide a detailed account of our experiment and our hypotheses in Part III. We then provide the results of our experiment and discuss the implications of those results on the legal system in Part IV.

II. LITERATURE REVIEW

Social science has spent more than fifty years investigating how intimate relationships influence criminal punishment.¹⁷ Yet, we find no study of intimate partnership and liability in a civil context. There are also no prior studies on either the female victim penalty or the intimacy bonus in civil actions. To understand the context and goals of our experiment, we begin by discussing the literature that finds a positive relationship between intimate relationships and criminal liability. We also discuss the theories that developed to explain this phenomenon.

As feminism entered the academy, scholars began looking at whether

17. Isabel Grant, *Intimate Femicide: A Study of Sentencing Trends for Men who Kill Their Intimate Partners*, 47 ALBERTA L. REV. 779 (2009); Kathleen Auerhahn, *Adjudication Outcomes in Intimate and Non-Intimate Homicides*, 11 HOMICIDE STUD. 213 (2007) (study of 1137 murders in Philadelphia from 1995 to 2000 in order to show a clear differentiation between stranger murder and intimate murder); Terance D. Miethe, *Stereotypical Conceptions and Criminal Processing: The Case of the Victim-Offender Relationship*, 4 JUST. Q. 571 (1987) (the more that an offender's crime fits the stereotype for that crime, the more likely the defendant is to move through the criminal justice system in a predictable way); National Clearinghouse for the Defense of Battered Women, *Sentencing Statistics Packet*, updated February 2007 (women are less likely to receive jail time and more likely to receive probation for intimate partner murders than men).

victims' or perpetrators' gender affected criminal sentencing.¹⁸ In general, these studies showed that female offenders were treated less harshly than male offenders and that all offenders who harmed females, especially white females, were treated more harshly than those who harmed males¹⁹:

[i]n general, women offenders are more likely to be released prior to trial, receive downward departures from sentencing guidelines, [are] less likely to be habitualized, [or] sent to prison/jail, and more likely to receive leniency in sentencing if given a term of incarceration when compared to their similarly situated male counterparts.²⁰

On the other hand, studies continue to show women are more harshly treated for some crimes. For example:

[W]omen who killed abusive husbands were sanctioned more severely than men who killed their wives . . . in spite of evidence that reports women were less likely to provoke the violence . . . and were most often acting in self-defense.²¹

Some of these results are attributed to intimate relationships between the male and female parties, in that men are treated more harshly for hurting female strangers (the female victim penalty) and less harshly for harming female intimates (the intimate partner bonus).²² The contradiction between the female victim penalty and intimate partner bonus led theorists to ask why women are sometimes treated better—and sometimes worse—by the criminal justice system.²³ Scholars attributed this contradiction to several different theories.

One theory is paternalism/chivalry, which posits that the mostly male actors in the criminal justice system protect women against harsh penalties while also punishing those who harm women.²⁴ In contrast, focal point theory postulates that police officers, prosecutors, and social workers all consider the social costs of female imprisonment so that they work

18. Kathleen Daly, *Neither Conflict nor Labeling nor Paternalism will Suffice: Intersections of Race, Gender, and Family in Criminal Court Decisions*, 35 CRIME & DELINQUENCY 136 (1989) (seeking explanations for why women are less likely to receive harsh punishment). Using studies of race and punishment as models, many of these early gender studies started with the hypothesis that assaults on female victims would receive less punishment than assaults on males and that female perpetrators would receive more punishment than their male counterparts. In general, those results did not hold.

19. Mark Beaulieu & Steven F. Messner, *Race, Gender, and Outcomes in First Degree Murder Cases*, 3 J. POVERTY 47 (1999) (citations omitted) (women receive less harsh sentences than men; male killers and killers of females receive the harshest treatment); Roy Lotz & John D. Hewitt, *The Influence of Legally Irrelevant Factors on Felony Sentencing*, 47 SOC. INQUIRY 39 (1977) (female offenders receive lighter sentences).

20. Courtney A. Franklin & Noelle E. Fearn, *Gender, Race, and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory or Gender Conflict?*, 36 J. CRIM. JUST. 279 (2008) (results show a female victim penalty and lighter punishment for female offenders).

21. *Id.* at 282.

22. See Auerhahn, *supra* note 17; Levine, *supra* note 5.

23. See, Daly, *supra* note 18.

24. See Beaulieu & Messner, *supra* note 19; Daly, *supra* note 18; Franklin & Fearn, *supra* note 20.

to decrease female incarceration. For example, a judge might shorten a female's imprisonment because the judge knows that there is no social safety net for lost (mostly female) childcare as opposed to a partial social safety net for lost (mostly male) wages.²⁵

Some scholars attributed the contradiction between the female victim penalty and the intimate partner bonus to repeat players in the criminal justice system who are under pressure to move people quickly through an overburdened system and who develop stereotypes of who deserves consideration and who deserves punishment in order to meet their desire for a quick turnaround.²⁶ On the other hand, conflict theory suggests that there is more punishment for those who harm "up" the social ladder than for those who harm "across" or "down."²⁷

Our experiment attempts to test two additional theories developed in the criminal context that seek to explain the female victim penalty and the intimate partner bonus. The evil woman theory attributes the contradiction between the female victim penalty and the intimate partner bonus to female stereotypes, arguing that women who step out of their assigned female roles (for example, by killing their husbands) are treated more harshly than when they stay in their (feminine) place.²⁸ Alternatively, the intimate social relations theory suggests that as people in conflict become socially closer, the law becomes more distant so that the likelihood of legal intervention decreases.²⁹

In this study, we provide the first empirical investigation of these theories in the civil context. We attempted to avoid any complications from focal point theory and legal community theory by not limiting survey participants to repeat players in the legal system. We sought to identify pa-

25. See Daly, *supra* note 18; Brian D. Johnson, Sigrid Van Wingerden & Paul Nieuwebeerta, *Sentencing Homicide Offenders in the Netherlands: Offender, Victim, and Situational Influences in Criminal Punishment*, 48 CRIMINOLOGY 981 (2010); Darrell Steffensmeier & Stephen Demuth, *Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 J. QUANTITATIVE CRIMINOLOGY 241 (2006) (uses focal point theory); Williams & Holcomb, *supra* note 4.

26. See Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201 (2009) (disparate impact of seemingly race-neutral sentencing rules); Johnson et al., *supra* note 25; Masser et al., *supra* note 6; Miethe, *supra* note 13; Heather Zaykowski, Ross Kleinstuber & Caitlin McDonough, *Judicial Narratives of Ideal and Deviant Victims in Judges' Capital Sentencing Decisions*, 39 AM. J. CRIM. JUST. 716 (2014) (judges punish more harshly for ideal victims).

27. Martha A. Myers, *Social Contexts and Attributions of Criminal Responsibility*, 43 SOC. PSYCHOL. Q. 405 (1980) (discusses conflict theory); see Daly, *supra* note 18; Franklin & Fearn, *supra* note 20.

28. See Stephanie Bontrager, Kelle Barrick & Elizabeth Stupi, *Gender and Sentencing: A Meta-Analysis of Contemporary Research*, 16 J. GENDER, RACE & JUST. 349 (2013); Herzog & Oreg, *supra* note 6; Stephanie Bontrager Ryon, *Gender as Social Threat: A Study of Offender Sex, Situational Factors, Gender Dynamics and Social Control*, 41 J. CRIM. JUST. 426 (2013) (patriarchal responses to threat often focus on controlling female sexuality, but often intersect with systems [such as the criminal justice system] that respond to race and class threat).

29. See BLACK, *supra* note 7.

ternalism by asking participants to report their sex, race, and age, and then by analyzing differences in response against these demographics.

The heart of our experiment is the intimate social relations theory, which predicts that females receive less protection the more intimate their relationships with the opposing party,³⁰ and the evil woman theory, which predicts that women are punished for engaging in unfeminine behavior.³¹ We test the theories by altering the evidence presented in each scenario: some participants are told that the parties had a previous sexual relationship and others are not.³²

On the surface, our results were different than predicted. Taken as a whole, our survey participants did not tend to punish females for their sexual activity; segmented out into groups, however, males and females exhibited significant differences.

III. THE SURVEY

In this study, we analyze responses to an original experimental survey with questions written by the authors. To conduct this experiment, we first conducted extensive pretesting of our instrument and received approval from Vanderbilt University's Institutional Review Board. Eight hundred participants were randomly contacted through the Vanderbilt University eLab Panel in April 2014.³³ The people contacted were given ten days and two dollars to read four scenarios and answer questions regarding legal responsibility or damages. We also requested information on demographic characteristics as well as other information that we discuss *infra*, in Appendix 1. Three participants did not complete the survey, making our final sample size 797.

We asked each of the participants to respond to four scenarios with legal consequences. Each of the four scenarios was based on actual events, although we hoped to disguise those events enough so that our participants only reacted to the scenarios as written.³⁴ Within each scena-

30. See Levine, *supra* note 5.

31. See Ryon, *supra* note 28.

32. In the sexual harassment scenario, we also present an alternative of a sexual relationship with a different coworker as a further control.

33. Founded in 1994, the Vanderbilt University eLab is an online opt-in panel for the Web-based research experiments and surveys. The Vanderbilt University eLab requires informed consent from its privacy protected subject pool. A few times a year, Panel members are asked to participate in eLab's online experiments and surveys. Our survey was fielded on eight hundred eLab participants generated randomly via Mechanical Turk. Participants must be eighteen years old or older to join the eLab panel. Membership is available to both domestic and international participants, but our survey only used United States residents. For more information on the Vanderbilt eLab please go to: <http://elab.vanderbilt.edu/>.

34. In this regard, the homicide is the most troubling because it involved the killing of Trayvon Martin by George Zimmerman, an event still in public consciousness. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013). The sexual harassment came from a deposition in a series of sexual harassment claims against American Apparel executives. See Laura M. Holson, *Chief of American Apparel Faces 2nd Harassment Suit*, N.Y. TIMES, Mar. 23, 2011, at B2; Shan Li, *American Apparel's Dov Charney accused of choking, insulting employee*, L.A.

rio, multiple endings, which included either no information about the parties' relations, information about how long the parties knew each other, or information about the sexual activity between the opposing parties, were available. Two of our scenarios had three possible endings and the other two scenarios had two possible endings. Each scenario's ending was randomized for each participant.

Through our analysis of how the participants' answers vary based on the extent of the information about the opposing parties' relationship, we seek to uncover whether women are penalized in legal situations for having sexual relationships with the opposing party. There is no previous empirical research on this topic outside of the work on intimate partners in the criminal context.³⁵

A. CRIMINAL LIABILITY AND SELF-DEFENSE

The first scenario was based on the death of Trayvon Martin at the hands of George Zimmerman and, in particular, Zimmerman's acquittal on the charge of second degree murder based on a claim of self-defense.³⁶ Our scenario followed the general outline of the story with the following exceptions: (1) a female victim in the story line (given to all participants); (2) victim and killer having previously met (one-third of the participants); and (3) victim and killer having previously had sex (another third of the participants).

The basic story line was as follows:

Michael is 5 feet 10 inches tall, thirty years old, and weighs 160 lbs. He is active in his Neighborhood Watch and holds a license to carry a concealed weapon.

Cheryl is also 5 feet 10 inches tall, thirty years old, and weighs 160 lbs.

One night when Michael is carrying a concealed loaded pistol with the safety off, Michael observes Cheryl within his Neighborhood Watch Area looking into the windows of expensive cars.

Michael follows Cheryl but Cheryl disappears and then suddenly reappears from a side street.

TIMES (Dec. 5, 2012). The long-term business relationship came from an unpublished divorce action. The short-term joint venture was taken from a local dispute in which the female plaintiff was asked on the stand if she had sexual relations with the male defendant. *Moran v. Willensky*, 339 S.W.3d 651 (Tenn. Ct. App. 2010).

35. Elizabeth Ann Dermody Leonard, *Convicted Survivors: The Imprisonment of Battered Women Who Kill* (1997), <http://freebatteredwomen.org/pdfs/convsurv.pdf> [<http://perma.cc/V6YD-KDAV>] (Ph.D. dissertation, University of California, Riverside); JOHN M. DAWSON & PATRICK A. LANGAN, BUREAU JUSTICE STATISTICS, *MURDER IN FAMILIES*, (1994), <http://www.bjs.gov/content/pub/pdf/mf.pdf> [<http://perma.cc/XJ9Q-YGW4>]; PATRICK A. LANGAN & JOHN M. DAWSON, *SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES*, BUREAU JUSTICE STATISTICS (1995); MATTHEW R. DUROSE, CAROLINE WOLF HARLOW, PATRICK A. LANGAN ET AL., *FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES*, BUREAU JUSTICE STATISTICS (2005); see Dawson, *supra* note 3.

36. See Lee, *supra* note 34.

Cheryl pushes Michael to the ground, straddles him, and repeatedly punches him in the face.

Michael fires the concealed pistol, fatally wounding Cheryl.

Michael is arrested and tried for killing Cheryl.

Survey participants were given one of three possible endings. One-third were given no additional information and were sent directly to the questions; one-third were told that: "At trial, it is proved that Michael and Cheryl had met one time six months before the shooting;" and one-third were told that: "At trial, it is proved that Michael and Cheryl had engaged in sexual intercourse one time six months before the shooting."

After reading the scenario with a randomized ending, participants were asked to respond to three questions:

1. "Do you think that Michael reasonably believed that his life was in danger when he killed Cheryl?"
2. "Do you think Michael was in actual danger of being killed when he shot Cheryl?"
3. "If it is entirely up to you as a one-person jury deciding whether Michael is legally responsible for killing Cheryl, what is your decision?"

The main outcome we examine is legal responsibility. The variations aim at the intimate partner bonus by which men receive less punishment for the murder of an intimate partner than for stranger murder.³⁷ In order to help isolate whether a decision on legal responsibility is influenced by the introduction of an intimate history net of any actual fear of harm, we also examine how information on a sexual relationship influenced participants' views of Michael's reasonable belief of actual danger. According to the intimate partner bonus literature, the introduction of a sexual relationship between the two parties should lower the likelihood of liability either because the law prefers to stay outside of intimate relationships (intimate social relations theory)³⁸ or because women have less social capital than men (conflict theory)³⁹ or because the women are being punished for stepping outside their social roles (evil woman theory).⁴⁰

B. SEXUAL HARASSMENT

The second scenario involved sexual harassment in the workplace. The basic story line came from a series of sexual harassment actions against executives at American Apparel:⁴¹

37. See discussion *supra* notes 1–8.

38. See *Intimacy*, *supra* note 3.

39. See Dawson, *supra* note 3.

40. See Ryon, *supra* note 28.

41. See Joni Hersch & Beverly Moran, *He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science*, 101 K.Y. L.J. 753 (2013) (media study of national press coverage of sexual harassment including the Ameri-

Ben was head of Sarah's department at work.

In the past several months, Ben repeatedly commented on Sarah's "nice legs" or "nice ass" while eyeing her up and down.

In addition, Ben touched Sarah on multiple occasions. On each occasion Sarah verbally protested and immediately pulled away but Ben continued to touch her.

One action that Ben performed three times was to pull Sarah's chair close to him and then rub Sarah's thighs.

Sarah pulled away twice and quit her job on the day Ben rubbed her thighs for the third time.

Sarah sues for sexual harassment.

In this scenario, we varied information on whether the victim had sexual relationships with anyone at work, with a third of the participants given one of these endings:

1. At trial, it is proved that Sarah never had sexual relations with anyone who worked in the office.
2. At trial, it is proved that Sarah had sexual relations with a person who worked in the office who was not Ben.
3. At trial, it is proved that Sarah and Ben had a sexual relationship that ended one year prior to her quitting.

Participants were given jury instructions providing actual information about legal responsibility for sexual harassment and asking for a decision about Ben's legal responsibility. Specifically, participants were told: "The jury receives an instruction that Ben is not legally responsible for sexual harassment unless Sarah appropriately informed him that she did not want him to touch her. If it is entirely up to you as a one-person jury, what is your decision in this case?" Participants then selected either that Ben was, or was not, legally responsible for sexually harassing Sarah.

We hoped to discover whether a "nuts and sluts" defense would change participants' decisions on liability.⁴² The nuts and sluts defense is based on the idea that women who claim sexual harassment may not recover because either they are acting vengefully against the person that they accuse (nuts) or that they are generally promiscuous (sluts).⁴³ Our hypothesis was that sexual activity with anyone in the workplace would decrease liability, and that sexual activity with the perpetrator of the harassment would destroy liability.

can Apparel litigations); Holson, *supra* note 34; Laura M. Holson, *He's Only Just Begun to Fight*, N.Y. TIMES, Apr. 13, 2011, at E1.

42. See Monnin, *supra* note 2 (concerning when prior sexual conduct can be admitted in a sexual harassment claim).

43. *Id.*

C. LONG-STANDING BUSINESS TRANSACTIONS

The third scenario considered division of assets after a thirty-year relationship between a man and a woman. This scenario was loosely based on a publicized divorce proceeding, although in our scenario, the parties were not married. In the scenario, the parties either did or did not have a sexual relationship over the thirty-year period.

The basic story line was as follows:

Susan has ten million dollars. Daniel comes from a middle class family with no personal fortune.

One year after meeting, Susan began paying for Daniel's housing, food, travel, and clothing up to the same standard Susan enjoyed. In return, Daniel became solely responsible for investing Susan's ten million dollars.

Thirty years pass, and Daniel's investment decisions have turned Susan's ten million dollars into forty million dollars. At this point, Daniel decides to sever his business relationship with Susan and withdraw his share of the forty million dollars.

Susan and Daniel do not have a legal agreement, and the state that they live in has no law that explains how, or if, they should share the \$40 million.

We varied the existence of a prior sexual relationship between the parties so that half the participants were told: "At trial, it is proved that Susan and Daniel never had a sexual relationship;" and half were told: "At trial, it is proved that Susan and Daniel had a sexual relationship for 30 years."

Our goal was to see if sexual activity between the two parties affected the amount of money participants split between the male and female. Participants were asked: "If it is entirely up to you as a one-person jury, what amount would you give to Daniel in this case? Your amount should be a dollar value between \$0 and \$40 million." Our hypothesis was that participants would give more money to Daniel if the two had a sexual relationship during the thirty years.

D. SHORT-TERM BUSINESS RELATIONSHIP

The fourth scenario involved a short-term joint business venture where the male misappropriated funds.

The story line was as follows:

Amy and John entered into a partnership for the renovation and sale of a house (flipping). Amy provided the financing and John supervised the renovation. John exhausted all of the project funds and convinced several workmen and suppliers to extend the partnership credit without informing Amy.

Before the project was finished, John abandoned the project and left the state. Amy discovered that the partnership owed \$50,000 when workers demanded payment and threatened lawsuits and liens.

Amy sues John for the \$50,000 of unauthorized charges.

We varied the existence of a prior sexual relationship between the parties. Half of the participants were told: "At trial, it is proved that Amy and John never had sexual relations." The other half were told: "At trial, it is proved that Amy and John had a sexual relationship." Participants were then asked: "If it is entirely up to you as a one-person jury, what amount would you give to Amy in this case? Your amount should be a dollar value between \$0 and \$50,000."

Our hypothesis was that those participants who were told that the parties had a sexual relationship would be less willing to award damages.

IV. FINDINGS

A. SCENARIO 1: CRIMINAL LIABILITY AND SELF-DEFENSE

Scenario One is the only crime we presented to our survey participants. The intimate partner literature predicts that the closer the relationship between parties, the more likely that the legal process will avoid imposing punishment.⁴⁴ The evil woman theory predicts that the more a female engages in unfeminine behavior, the more likely that she will be punished.⁴⁵ Both theories support the prediction that a male's claim of self-defense would become more successful once the female engaged in sexual activity.⁴⁶ Instead, in our study, the opposite proved true, and the female victim penalty increased when sexual activity between the male and female was introduced.

As the results presented in Table 1 demonstrate, on average, the participants were more likely to hold Michael legally responsible when informed that Michael and Cheryl had sexual relations before the fatal encounter. The differences were substantial, with participants being 14.0 percentage points more likely to find Michael legally responsible when informed of the sexual relationship than when given no information. Table 1 also shows that whether participants believed Michael reasonably believed that his life was in danger was related to his having a sexual relationship with Cheryl. Participants were 16.9 percentage points less likely to find that Michael reasonably feared for his life when they were told about a sexual relationship than when given no information.

Surprisingly, although more than half of the participants accepted that Michael reasonably believed his life was in danger, far fewer believed that he was in actual danger. Given the same information about a prior relationship, participants were from 17.3 percentage points (if informed of a sexual relationship) to 28.7 percentage points (if given no information about a prior relationship) less likely to believe Michael was in actual danger. Therefore, given that participants did not overwhelmingly consider Michael to have been in actual danger, an increased belief in his

44. See *Intimacy*, *supra* note 3.

45. See Ryon, *supra* note 28.

46. See *Intimacy*, *supra* note 3; *id.*

responsibility is likely connected to a decreased belief that Michael's fear for his life was reasonable once a sexual relationship is introduced.

TABLE 1. IS MICHAEL LEGALLY RESPONSIBLE FOR KILLING CHERYL?

| All participants | (1) Met once | (2) Sexual intercourse | (3) No information | Significant differences ^a |
|------------------------------------|--------------|------------------------|--------------------|--------------------------------------|
| Reasonably believed life in danger | 70.3 | 55.2 | 72.1 | 1-2, 2-3 |
| Was in danger | 42.8 | 37.9 | 43.4 | none |
| Legally responsible | 48.0 | 57.0 | 43.0 | 2-3 |
| N | 269 | 277 | 251 | |

^a Significant differences between values in indicated columns at 10% level based on a Bonferroni multiple comparison test.

Table 2 examines responses for male participants and female participants separately in order to identify whether men and women differ in their responses when given information about a sexual relationship between the two parties.

Table 2 shows that the pattern across scenario endings was similar for both men and women, with both genders being more likely to find Michael legally responsible if he and Cheryl had prior sexual relations. What is striking is how differently men and women processed the same information when sexual activity was involved. When no information about a prior sexual relationship was provided, men and women did not differ on whether Michael was in danger or whether Michael was legally responsible. When Michael and Cheryl had sexual relations, or had met one time earlier, men were substantially more likely than women to believe that Michael reasonably believed he was in danger, and that he actually was in danger. Correspondingly, men were less likely to find Michael responsible. Women were also 15.9 percentage points more likely to find Michael legally responsible if Michael and Cheryl had met once and 12.0 percentage points more likely to find Michael responsible if Michael and Cheryl had sexual intercourse.

TABLE 2. IS MICHAEL LEGALLY RESPONSIBLE FOR KILLING CHERYL?
DIFFERENCES BY GENDER OF PARTICIPANTS

| Female | Met once | Sexual intercourse | No information | Significant differences ^a |
|------------------------------------|----------|--------------------|----------------|--------------------------------------|
| Reasonably believed life in danger | 68.8 | 47.9 | 69.1 | 1-2, 2-3 |
| Was in danger | 35.9 | 31.1 | 40.0 | None |
| Legally responsible | 56.3* | 63.9* | 48.2 | 2-3 |
| N | 128 | 119 | 110 | |

| Male | Met once | Sexual intercourse | No information | Significant differences ^a |
|---------------------------------------|----------|-----------------------|-------------------|---|
| Reasonably believed life in danger | 71.6 | 60.8* | 74.5 | 2-3 |
| Was in danger | 48.9* | 43.0* | 46.1 | None |
| Legally responsible | 40.4 | 51.9 | 39.0 | 2-3 |
| N | 141 | 158 | 141 | |

^a. Significant differences between values in indicated columns at 10% level based on a Bonferroni multiple comparison test.

* indicates significant differences between male and female responses for the same scenario at 10% level and is assigned to the higher value between male and female.

There were additional findings of interest based on a regression analysis (described *infra* in Appendix 1). These findings include that, given the same ending, black women were 23.7 percentage points more likely than were white women to find Michael responsible for the homicide. Females who reported their political party as Democratic or Independent were more likely to find Michael responsible than were female Republicans. Men who favored strict gun laws were more likely to find Michael responsible than were men who favored loose gun laws. In addition, both males and females who considered themselves safer with a gun in their home were less likely to find Michael responsible than were those who did not consider themselves safer with a gun in their home.

B. SCENARIO 2: SEXUAL HARASSMENT

Currently, under workplace sexual harassment law, liability for sexual harassment is based on unwelcome behavior.⁴⁷ As a result, defense lawyers often introduce evidence of past sexual behavior in order to destroy a claim that the defendant's behavior was unwelcome: thus the popular "nuts and sluts" defense.⁴⁸ Based on that defense, we predicted that the introduction of a sexual relationship would have the greatest impact in the sexual harassment scenario, but we found the exact opposite. The vast majority of participants found Ben liable no matter whether Sarah engaged in sexual activity or not, either with her harasser or with another coworker, and this result did not vary based on the gender of the participants.

47. *Id.*

48. *Id.*

TABLE 3: LIABILITY FOR SEXUAL HARASSMENT
INVOLVING BEN AND SARAH

| | (1) No office relationships | (2) Sexual relationship not with Ben | (3) Sexual relationship with Ben | Significant differences ^a |
|---------------------------------|--------------------------------|---|--|---|
| Legally responsible | 96.7 | 98.5 | 95.0 | 2-3 |
| Legally responsible – female | 97.9 | 99.1 | 97.0 | none |
| Legally responsible – male | 95.3 | 98.0 | 93.4 | none |
| N | 273 | 265 | 259 | |
| N female | 144 | 114 | 99 | |
| N male | 129 | 151 | 160 | |

^a. Significant differences at 10% level based on t-test. There are no statistically significant differences between the male and female responses given the same information about a sexual relationship.

C. SCENARIO 3: LONG-STANDING BUSINESS TRANSACTIONS

For the division of \$40 million arising from Daniel's management of Susan's wealth, we found that on average, participants did not assume that an equal split was appropriate and awarded less than half of the \$40 million to Daniel. But participants were more likely to award Daniel a larger share—approximately \$3 million more—if the two had a long-term sexual relationship, suggesting the presence of an intimate partner bonus. Men and women, given the same information about a prior sexual relationship, did not differ statistically in the amount they would award Daniel.

TABLE 4. LONG-STANDING BUSINESS RELATIONSHIP
BETWEEN SUSAN AND DANIEL

| | No sexual relationship | Sexual relationship | Significant differences ^a |
|-----------------------------|---------------------------|------------------------|---|
| Average award (in millions) | 11.30 | 14.27 | Yes |
| Average award – female | 10.46 | 14.31 | Yes |
| Average award – male | 11.96 | 14.23 | Yes |
| N | 405 | 390 | |
| N female | 178 | 178 | |
| N male | 227 | 212 | |

^a. Significant differences at 10% level based on a t-test. There are no statistically significant differences between the male and female responses given the same information about a sexual relationship.

In regression estimates, again described in the Appendix, we found that the race of the participant also seemed not to matter. However, the regression analysis did present other findings of interest, including that, given the same ending, both male and female participants who were age thirty and older would award Daniel about \$2 million less than would

those under thirty. Women who had greater than a high school education would award Daniel nearly \$4 million less than would those with a high school education or less. Finally, education did not affect male participants' awards.

D. SCENARIO 4: SHORT-TERM BUSINESS RELATIONSHIP

We predicted that the introduction of a previous sexual relationship would reduce the female investor's chance of holding her male partner liable. Based on the evil woman theory, we thought that a woman in an uncommon business relationship who also engaged in sexual activity with her partner could be viewed as looking for trouble in the shape of an intimate partner bonus. As shown in Table 5, our hypothesis held true for our male participants. When informed of a sexual relationship, men penalized Amy by awarding her \$2,072 less than when there was no sexual relationship. When comparing male and female participants' awards, given the same information, men and women awarded damages in nearly equal amounts when there was no sexual relationship reported. When a sexual relationship was proven, males awarded Amy \$3,306 less than did women, suggesting that males were more likely to provide an intimate partner bonus than females. The result seems particularly strange because it appears that the scenario provoked just the opposite of the "typical" male reaction. If a female misused funds in a business project, it seems unlikely that a jury having knowledge of her sexual relationship with the person that she stole from would decrease her liability.

TABLE 5: SHORT-TERM BUSINESS RELATIONSHIP
BETWEEN AMY AND JOHN

| | No sexual relationship | Sexual relationship | Significant differences ^a |
|------------------------|---------------------------|------------------------|---|
| Average award | 44,369 | 43,686 | No |
| Average award – female | 44,446 | 45,539* | No |
| Average award – male | 44,305 | 42,233 | Yes |
| N | 392 | 405 | |
| N female | 179 | 178 | |
| N male | 213 | 227 | |

^a Significant differences at 10% level based on t-test.

* indicates significant differences between male and female response for the same scenario at 10% level and assigned to the higher value between male and female.

V. IMPLICATIONS AND CONCLUSIONS

The intimate partner literature shows that a sexual relationship between the victim and the defendant affects criminal sentencing, while the legally irrelevant factors literature shows that gender, especially victim's

gender, matters as well.⁴⁹ Gender matters because female perpetrators generally are less likely to receive punishment, although assailants with female victims, especially white female victims, receive harsher punishment.⁵⁰ This effect is known as the female victim penalty. Sexual activity matters because sentencing for stranger homicide is different from the punishments for intimate partner homicide. This effect is known as the intimate partner bonus and it does not attach to women, who are sometimes punished more for killing intimate partners than are men who commit the same crime.⁵¹

Both the female victim penalty and the intimate partner bonus are based on studies of criminal sentencing.⁵² No one has explored whether the female victim penalty or the intimate partner bonus hold for civil liability, as well.

This study is the first to address whether the introduction of sexual activity also plays a role in civil actions. In particular, based on the view that the closer the parties, the more distant the law, we sought to discover if sexual activity worked against women in both criminal and civil actions.⁵³ In our own unique survey, we asked randomly selected U.S. residents to judge liability in four scenarios, only one of which had criminal law implications.

There were three scenarios where the basic decision was how much liability the male should incur, or whether the male should be legally liable, as well as one scenario in which the question was how much the male would gain in a division of assets. Our results were as follows:

- (1) When the scenario asked for legal responsibility in a homicide, both men and women were more likely to find responsibility once sexual activity was introduced, but men were significantly less likely to find responsibility than women;

49. John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357 (1974) (review of twenty prior studies of defendant's race and sentencing); see Auerhahn, *supra* note 17.

50. See Williams et al., *supra* note 4; Beaulieu & Messner, *supra* note 19; Amy R. Stauffer et al., *The Interaction Between Victim Race and Gender on Sentencing Outcomes in Capital Murder Trials: A Further Exploration*, 10 HOMICIDE STUD. 98 (2006) (relationship of gender to sentence is nuanced depending on the degree of intimacy between victim and offender).

51. See Auerhahn, *supra* note 17; Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 545 (2007) (stand your ground is not a defense when women are battered); Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as a Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014); Judith E. Koons, *Gun-smoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617 (2006) (self-defense is not generally awarded to women who kill as it is to men); Victoria B. Titterington & Laura Harper, *Women as the Aggressors in Intimate Partner Homicide in Houston, 1980s to 1990s*, 41 J. OFFENDER REHABILITATION 83 (2005).

52. See Franklin & Fearn, *supra* note 20; *Rethinking*, *supra* note 3.

53. See BLACK, *supra* note 7.

- (2) When the scenario asked for a monetary award in a short-term joint business venture, men awarded less money to the female involved in a sexual relationship;
- (3) When the scenario asked for a monetary award in a long-term partnership, men and women both increased the award when a long-term sexual relationship was introduced;
- (4) Men and women also agreed on liability in the sexual harassment scenario. That puts them in conflict with generally held beliefs in the legal community that prior sexual relationships are an effective defense to a sexual harassment charge. In the sexual harassment scenario, the participants found liability so consistently that we found no differences within any of the categories we studied whether or not the female character had a history of sexual relations with anyone in the workplace.

What is striking about our findings are the differences revealed when we segment participants by male and female. These results show that men were more likely than women to lower the punishment for a male when the parties previously had a prior sexual relationship except in the one area—sexual harassment—where the law explicitly allows evidence of sexual relationships.⁵⁴ In the sexual harassment scenario, the participants were unaffected by the introduction of sexual activity, suggesting that this evidence may actually be irrelevant.

One suggestion from the literature itself is that the role of sexual activity in liability and punishment is changing. For example, despite the female perpetrator advantage found in the literature,⁵⁵ arrests of women are up 34% and female incarceration is up 400%.⁵⁶ In fact, females are the fastest growing segment of the prison population.⁵⁷ The literature generally looks at the 1980s as the time that the effect of gender on sentencing began to diminish.⁵⁸ In order to test the view that a new generation views sexual activity and punishment differently, we looked at differences by age from those born before 1985 to those born after 1985. The over-thirty, under-thirty split cut our data base almost exactly in half. However, there was no support for a difference by under and over age thirty when participants are told about a prior sexual relationship.

A word of caution for practicing lawyers: we have anecdotal evidence that practicing attorneys worry about whether sexual relationships will harm their female clients' ability to recover in transactional disputes. In fact, this research was prompted by that anecdotal evidence. Unfortunately, the results of this study do suggest that women are punished for their sexual relationships even in civil lawsuits—in business, if not in em-

54. See FED. R. EVID. 412, 415.

55. See Beaulieu & Messner, *supra* note 19.

56. See Bontrager, Barrick & Stupi, *supra* note 28; Dawson, *supra* note 3.

57. *Id.*

58. *Id.*

ployment, settings—by both men and women; and that they are particularly harmed by male decision makers.

On the other hand, attorneys in sexual harassment suits might consider taking cases that they might previously have avoided because of the taint of a sexual relationship given that the “nuts and sluts” defense—the defense we expected to be most successful in the sexual harassment scenario—did not gain traction with any of the survey participants. This might be the most surprising finding in our results. If U.S. residents have changed their view of female sexual activity to such an extent that they were willing to find liability for sexual harassment even between parties who were previously in a sexual relationship, this new view of female sexuality might make prior sexual behavior legally irrelevant in sexual harassment lawsuits.

APPENDIX: REGRESSION ANALYSIS & CONTROLS

Because the study design was a randomized survey experiment in which participants were randomly assigned endings, individual characteristics were likewise randomly distributed and therefore uncorrelated with the information that participants viewed about sexual relationships. This implies, in short, that statistical tests for differences in average responses across endings were valid and that it was unnecessary to use multiple regression analyses to control for other characteristics in order to produce unbiased statistical results. In the text, we begin by reporting these tests for differences in average responses by ending for each scenario.

However, because the questions referred to sexual activity, we anticipate that the gender of the participant may influence the response to the different scenario endings. We likewise believe that racial differences in exposure to violence may have led to differences in responses to scenarios by race, especially for Scenario One, which involves violence. We also sought to identify if different values such as political affiliation or support for strong gun control policies interact with information on sexual activity provided in the scenarios. Thus, in order to determine if some factors outside of the scenarios are relevant to survey responses, we asked each participant for the information listed below, which we examine in multiple regression analyses. Much of the information is standard demographic information that is reported in surveys that are not based on an experimental design and are therefore used as controls in multiple regression analyses. Some experimental studies also control for similar characteristics.⁵⁹

1. Age
2. Gender (male or female)
3. Number of children who ever lived with the family unit
4. Marital status (married, marriage like relationship, widowed, separated, divorced, never married)
5. Hispanic/Not Hispanic
6. Race (white, Black, Asian, other)
7. Citizenship status (citizen, permanent resident, temporary resident, other)
8. Highest level of education
9. Frequency of participation in religious services
10. Work history (full time, part time, not working)
11. Household income
12. Prior service on a criminal jury

59. David A. Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift* 43-61 in CASS SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 54 (University of Chicago Press 2003) (reference to various personal characteristics of mock jury experiment respondents); W. KIP VISCUSI & WESLEY A. MAGAT, *LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION* 102 (Harvard University Press 1987) (example of demographics for hazard warning experiment study).

13. Prior service on a civil jury
14. Political affiliation (Democrat, Independent, Republican, other)
15. Geographic location (city, suburb, small town, rural)
16. State of residence
17. Participation in a wide array of sports including basketball, cycling, fishing, hunting, golf, running, skiing, soccer, swimming, target shooting, tennis, and yoga
18. Preference for gun control laws (strict, loose, no opinion)
19. Belief that a gun in the home makes its residents safer
20. Conviction for any crime
21. Conviction for a violent crime

Our regressions confirmed our expectation that our randomized experimental design made regression analyses unnecessary for statistical reliability. With the exception of gender of participant, other characteristics were almost never statistically significant in the regressions. The overall regression results for Scenario Four had little explanatory power, and these results are not discussed in the text. The regression results for Scenarios One, Two, and Three are discussed in the text.

Articles

